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IN THE

SUPREME COURT OF THE UNITED STATES

No. 929 | October Term, 1944.

PAULINE E. BARRY, Administratrix of the ESTATE OF RALPH E. BARRY, deceased,
Petitioner,

vs.

READING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

No. . OCTOBER TERM, 1944.

PAULINE E. BARRY, Administratrix of the ESTATE OF RALPH E. BARRY, deceased,
Petitioner,

vs.

READING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Pauline E. Barry, Administratrix of the Estate of Ralph E. Barry, deceased, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals for the Third Circuit rendered and entered on the 10th day of July, 1944 and which became final on the 29th day of December, 1944, in this case lately pending in said Circuit Court of Appeals, entitled Pauline E. Barry, administratrix of the Estate of Ralph E. Barry, deceased, Plaintiff-Appellant, vs. Reading Com-

pany, Defendant-Appellee, being cause No. 8583 of October Term, 1943 of civil causes on the docket of said Circuit Court of Appeals, affirming a judgment of the United States District Court for the District of New Jersey, in said cause, in favor of the respondent and against your petitioner herein.

OPINIONS OF THE COURT BELOW AND DISSENTING OPINION.

The original opinion of the United States Circuit Court of Appeals for the Third Circuit which your petitioner seeks to have reviewed appears on pages 369 and 370 of the printed transcript of the record filed herewith. The opinion of said Court upon rehearing appears on pages 381 to 383 inclusive and the dissenting opinion of Judge Biggs appears on pages 383 to 388 inclusive of the printed transcript. None of said opinions have as yet been published.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was instituted by petitioner, Pauline E. Barry, Administratrix of the Estate of Ralph E. Barry, deceased, against respondent, Reading Company on the 14th day of October, 1942 in the United States District Court for the District of New Jersey under the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51; Act of April 22, 1908, c. 149 sec. 1; 35 Stat. 65 and its amendments) to recover damages for the alleged wrongful death of said Ralph E. Barry, deceased, who, while in respondent's employ as a brakeman, was run over and killed by a freight car in respondent's classification yard, leaving to survive him a widow and a minor child, this suit being for their benefit. It was conceded that both the decedent

and his employer, the defendant railroad were engaged in interstate commerce at the time of the accident. Petitioner, plaintiff in the District Court, alleged in her complaint that her action arose under the said Act and also averred that defendant had violated the provisions of the Safety Appliance Act (45 U. S. C. A. Sec. 11, 12; Act of April 14, 1910, c. 160; 36 Stat. 298) and had failed to provide the decedent with a safe place to work. Defendant's answer set up a separate defense of contributory negligence. The cause came to trial before the District Judge and a jury and in the opening counsel for the plaintiff claimed a right of recovery under the Acts referred to. A verdict was rendered in favor of the defendant which the Courts below have refused to set aside.

As appears from the evidence, Barry was riding two gondolas or "battleship cars" down the west "hump" of defendant's classification yard at Rutherford, Pennsylvania at 12:20 A M., on August 15. 1942. Preceding him was a single freight car ridden by a green brakeman, Rihm (308a, 316a) which was moving slower than Barry's cars (20a, 21a, 24a, 311a, 313a). Warnings were shouted to the riders to avoid collision (21a, 23a, 312a). The cars cars collided but did not couple (310a, 311a) and Barry's body was seen falling from his car as Rihm's car moved down the track (193a). Barry's car stopped immediately after the collision (310a) and his body was found against the rear truck about 34 feet from his brake step (31a).

The evidence upon which plaintiff relied was apparently conceded by defendant and the Court below to have made out a jury case. It was that it was the duty of Rihm to keep a look-out ahead and behind (312a) to keep the cuts a safe distance apart (25a) and to avoid collision (22a); that Rihm was looking forward (20a) and did not look back until he heard the warning shouts (22a, 309a, 312a); that he then applied his brakes to stop his car and couple Barry's car and the cars collided but did not cou-

ple (310a, 315a). When the warning was given Barry was on his brake step looking forward (20a). He was next seen falling to the ties (180a, 184a) as Rihm's car moved away (193a). Immediately after the accident another brakeman, McCleary, went up on the brake-step of Barry's car and found that the brake was on to some extent (72a); that although the ratchet wheel was equipped with an automatic or self-engaging pawl (36a, 91a, 111a) he had to kick the ratchet in order to engage the pawl and tighten the ratchet another notch (64a); that the ratchet wheel and brake staff were worn and loose (64a, 256a, 257a, 258a, 285a); and that the car had standard Pennsylvania Railroad brake equipment but a brake wheel from the Central Railroad of Georgia (99a). Evidence was given that a ratchet wheel, if efficient (251a, 281a) and secured to the brake staff would not have had to be kicked in order to engage the pawl in applying the brake (65a, 91a, 104a, 105a); that when the ratchet is loose the brake is inefficient and defective (104a, 114a, 121a) and that the brakeman would not be able to tighten the brake and retain his position on the brake step (103a); that in order to kick the ratchet he must take his foot off the step and his shoe may slip and catch under the ratchet so as to throw him off balance (105a). While being removed from under the car Barry said that his foot was caught (66a). Evidence was also given that the brake step was defective (122a) in that it was split (121a, 126a) which would cause it to ride up and down (127a); and that the particular brake wheel on this car could give only fifty percent braking power (100a, 111a).

Defendant was permitted, over plaintiff's objection, to offer testimony that Barry's car was removed from the scene of the accident and examined by car inspectors from one to eight hours thereafter (133a, 237a, 270a) without any showing that the brake was then in the same condition as at the time of the accident (137a, 186a, 215a, 223a,

237a). These witnesses did not operate the car or set it in motion and made only a "stationary" inspection of the brake (204a, 250a, 282a) and some of them had never ridden such a car down a hump (204a, 218a, 292a). They testified that at the time of their examination they found that the ratchet was loose (242a) and the brake staff worn (256a) and that there was as much as 3/16ths of an inch play between the two (252a, 256a, 257a, 259a, 284a). Over plaintiff's objections, these witnesses were permitted to testify that the brake was effective and efficient (203a, 249a, 250a, 263a, 271a, 272a) and in good operating condition (211a, 242a) and that ordinarily there was play between the shaft and the ratchet on many cars of this kind (74a, 79a). Defendant did not produce the witnesses who were present at the time of the accident (32a, 152a, 153a, 156a) nor the brakeman who released the brake in order to move the car (140a) although some of them were in the courthouse at the time of the trial (156a, 307a). In his charge, the District Judge instructed the jury that from this evidence they might find that the brake was a safe appliance (340a) without properly explaining the significance of the standards and regulations of the Interstate Commerce Commission and the absolute requirement that appliances conform thereto.

During the trial plaintiff's witness, McCleary, turned hostile and upon a plea of surprise (49a, 55a) his previously signed statement (68a) was introduced. The trial judge refused to permit inquiry as to the truth of this statement (58a, 61a, 62a) and limited the use of conflicting statements therein to the neutralization of his evidence on the witness stand (53a, 59a, 67a).

Over plaintiff's objection, the District Judge refused to submit to the jury any right of the plaintiff to recover on the ground of the common law negligence of the defendant's employees under the Federal Employer's Liability

Act and limited plaintiff's right of recovery to a finding of a violation of the Safety Appliance Act.

Prior to the charge the Trial Judge, over plaintiff's objections, consented to defendant's request No. 3 (324a, 327a), agreeing to qualify it with a charge as to the jury's right to consider the circumstantial evidence and make reasonable inferences from the testimony (327a); this he entirely omitted to do, and refused a specific request, after the charge, to charge as to the presumption arising from the death of the decedent (340a, 341a).

After verdict and judgment for the defendant on April 23, 1943, the plaintiff moved to set aside the verdict and for a new trial (346a) which was passed upon in an opinion filed by District Judge Forman and an order denying the motion was entered January 13, 1944 (350a, 358a). Plaintiff in due course appealed to the United States Circuit Court of Appeals for the Third Circuit and the cause was there presented upon oral argument and printed briefs (368a). On July 10, 1944 said Court filed an opinion, Per Curiam, affirming the judgment and stating that the record fails to disclose any reversible errors (369a). Petitioner duly filed in said Court her petition for rehearing of said cause (371) which petition was granted by said Court on November 2, 1944 (380). The cause was thereupon re-argued before the said Court *en banc* on December 8, 1944 (380). On December 29, 1944 an opinion was filed by Judge Jones on behalf of a majority of said Court confirming the former decision (381) and a dissenting opinion was filed by Judge Biggs wherein he held that the judgment of the District Court should be reversed and a new trial ordered (383).

The duly certified record is filed herewith under separate cover, together with the requisite number of printed copies thereof.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Title 28 U. S. C. A. Sec. 347, providing for review by this Court, by certiorari, of decisions of the Circuit Court of Appeals. The judgment of the United States Circuit Court of Appeals for the Third Circuit here sought to be reviewed was entered on July 10, 1944 (370). A petition for rehearing was duly filed by this petitioner, appellant in said Circuit Court of Appeals within the time provided by the rules of said Circuit Court of Appeals (371). The said petition was duly granted and the rehearing held (380). On December 29, 1944 the said judgment was confirmed by a majority of said Court (381), a dissenting opinion being filed by Judge Biggs (383).

QUESTIONS PRESENTED.

The questions presented by petitioner's petition herein for a writ of certiorari are:

(1) In an action under the Federal Employers' Liability Act to recover damages for the death of a brakeman, did the court properly construe the Safety Appliance Act and the standards and regulations established thereunder when it admitted opinion evidence that an appliance which did not conform to the standards was nevertheless efficient and in good operating condition and that brakes on other cars were found in similar condition, and then instructed the jury that from such evidence they might find that the appliance was safe and could therefore exculpate the railroad?

(2) Whether reversible error was committed by the trial court in permitting the introduction, over objection,

of opinion evidence as to the efficiency and working condition of a brake at the time of an accident by witnesses who had never tested the brake in operation and who examined it hours after the car had been moved from the scene of the accident and no evidence was produced to show that the condition of the brake had remained the same?

(3) Whether reversible error was committed by the trial court holding that a previously signed statement of a witness could not become substantive evidence in the case even though the witness stated on the witness stand that its content was true?

(4) Whether by the judgment of the Circuit Court of Appeals petitioner was denied a right to which she was entitled under the Federal Employers' Liability Act, namely, the right specifically claimed by her to have the jury pass upon the evidence of defendant's general negligence independent of its violations of the Safety Appliance Act and determine whether the decedent's injury and death were due to such general negligence?

(5) Whether a trial court has committed reversible error in failing to qualify a request for charge, as it had agreed to do, and in charging that the jury should return a verdict for the defendant if it was unable to determine the cause of decedent's fall without stating that the jury might consider all the circumstances and make all reasonable inferences therefrom as to whether the fall resulted from the failure of the brake and refusing to state that the jury might also consider the presumption arising from decedent's death?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) The construction of the Safety Appliance Act and the regulations of the Interstate Commerce Commission is a question of federal law and the decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court: St. Joseph G. & I. Ry. Co. v. Moore, 243 U. S. 311, 37 S. Ct. 278; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 28 S. Ct. 616. The standards and regulations require that the ratchet wheel must be "secured" to the brake shaft and they designate a loose ratchet wheel or loose brake shaft as a defect. The testimony given by defendant's car inspectors was that these parts were worn and loose (256a, 257a, 258a, 285a) and that there was a play or looseness between the parts estimated at from 1/8 of an inch to 3/16ths of an inch (242a, 252a, 256a, 257a, 259a, 284a). Nevertheless, over the plaintiff's objection, these witnesses were permitted to testify that the brake was effective and efficient (203a, 249a, 250a, 263a, 271a, 272a) and in good operating condition (211a, 242a) without reference to the requirements of the regulations and were also permitted to testify that ordinarily there was play between these parts on many similar cars (74a, 79a). This improperly admitted testimony was the only evidence which created a question of fact as to the violation of the Safety Appliance Act by the defendant. The trial judge did not instruct the jury that the brake must conform to the regulations and that nonconformity was negligence per se but charged the jury that the regulations specified minimum dimensions only (340a) and that from this evidence they could find that the brake was a safe appliance and deny recovery (339a, 340a). In so doing the regulations were effecively nullified as is succinctly stated in the dissenting opinion of Judge Biggs of the Circuit Court of Appeals (383). In failing to find error in the trial of the cause, the majority

of the Circuit Court of Appeals has erroneously construed the Act and the regulations and has applied the doctrine of equivalents prohibited by the decisions of this Court.

(2) The only testimony presented by the defendant to prove that the brake was efficient and in compliance with the Safety Appliance Act and Interstate Commerce Commission regulations was that of its car inspectors. These witnesses did not examine or test the brake while the car was in motion (204a, 250a, 282a) and, in fact, two of them had never ridden such a car down a "hump" (204a, 218a, 292a). Their examinations were made from one to eight hours after the accident (133a, 237a, 270a) and no evidence was offered to show that the brake was in the same condition when they examined it as at the time of the accident (137a, 186a, 215a, 223a, 237a). The trial court nonetheless admitted their evidence that the brake was effective, efficient and in good working condition (203a, 211a, 242a, 249a, 250a, 263a, 271a, 272a). In determining that this did not constitute reversible error, the decision of the Circuit Court of Appeals is in conflict with the earlier decisions of that Circuit and of other Circuits which consistently have held that the test of compliance is the operating efficiency of the appliance.

(3) The judgment of the Circuit Court of Appeals in finding no reversible error in the action of the District Court is in direct conflict with the decision of the Second Circuit in the case of *Stewart v. B. & O. R. R. Co.*, 137 F 2d 527. The witness McCleary turned hostile during his examination on behalf of the plaintiff. Upon a plea of surprise, his previously signed statement was produced and identified by him. He was then asked specifically whether it was true (58a, 61a, 62a). The District Judge refused to permit the inquiry and ruled that the contents of the statement could not become substantive evidence even if

true (53a, 59a, 67a), a ruling precisely contrary to the decision in the above case.

(4) The United States Circuit Court of Appeals by its judgment affirming the judgment of the District Court denied petitioner a right specifically set up and claimed by her to which she is entitled under the Federal Employers' Liability Act, namely, the right to have the jury pass upon the evidence that the death of the decedent resulted from the general negligence of the defendant independent of its violations of the Safety Appliance Act. The complaint set up this claim (2a) and it was presented to the jury in the opening statement (14a-15a) and to the trial judge in a request for charge (343a; *cf.* 341a). From the evidence the jury might well have decided that the accident was due to the failure of Rihm to keep a lookout (22a, 309a, 312a) as required of him (22a, 312a) or the negligent cutting off of the two drafts so that they travelled too close together (21a, 22a) and collided, throwing decedent to the ground. On the motion for new trial the District Court held that this claim was waived at a pre-trial conference (351a) but it will be seen that no order was made limiting the issues under Rule #16 (1a). The defense of contributory negligence raised by the defendant (6a) and applicable only to this claim, was never withdrawn nor stricken (11a). The judgment is in conflict with the applicable decisions of this Court and the Circuit Courts holding that reliance upon violations of the Safety Appliance Act does not defeat the right to rely upon the concurrent general negligence of the railroad under the Federal Employers' Liability Act. It is a matter of prime public importance that the rights vouchsafed to railroad employees by the benign provisions of the Act be fully recognized, protected and enforced by every court in the land.

(5) Since petitioner believes that this Court will issue

its Writ for the reasons hereinbefore set forth, petitioner desires to have considered also the basic and fundamental error of the trial judge in his charge to the jury. Defendant requested a charge that a verdict for the defendant must follow if the jury was unable to determine the cause of decedent's fall (345a). The trial judge agreed to qualify this request with the direction that the jury might consider all the circumstances and make reasonable inferences (327a, 328a). This he omitted entirely from his charge and after the charge refused a specific request to instruct on the presumption arising from the death of the decedent (340a).

PRAYER.

Wherefore your petitioner prays that a writ of certiorari be issued by this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit to the end that said opinions and judgment of said Circuit Court of Appeals in said cause be reviewed by this Court, as provided by law, and that upon such review said judgment of the said Circuit Court of Appeals be reversed, and that petitioner have such other relief as this Court may deem appropriate.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURT BELOW AND DISSENTING OPINION.

The original opinion of the United States Circuit of Appeals for the Third Circuit in said cause of PAULINE E. BARRY, Administratrix of the Estate of Ralph E. Barry, Deceased, Plaintiff-Appellant vs. READING COMPANY, which petitioner here seeks to have reviewed, appears on pages 369 and 370 of the printed record filed herewith. The opinion of the majority of said Court upon rehearing, confirming the original decision, appears on pages 381 to 383 inclusive. The dissenting opinion of Judge Biggs appears on pages 383 to 388 inclusive of the printed transcript. None of said opinions have as yet been published.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioner's petition for a writ of certiorari herein, and in the interest of brevity are not repeated here.

SPECIFICATIONS OF ERROR TO BE URGED.

The United States Circuit Court of Appeals for the Third Circuit, in the majority opinion of said Court in this cause, erred:

(1) In deciding that there was no reversible error in the reception of evidence to the effect that an appliance was efficient although it failed to meet the definite stand-

ards of the Safety Appliance Act and regulations promulgated pursuant to it.

(2) In holding that there was no error in the admission of opinion evidence as to the efficiency of a brake by witnesses who made only a stationary inspection at times when the brake was not proved to have been in the same condition as at the time of the accident.

(3) In deciding that there was no error in holding that a prior inconsistent statement of a witness cannot become substantive evidence if he declares its truth on the witness stand.

(4) In holding that the elimination from the case of the right of recovery for general negligence did not constitute error.

(5) In holding that no error was committed in failing to qualify a request for charge as agreed.

ARGUMENT.

This is an action to recover damages for the death of a railroad brakeman employed by the defendant in interstate commerce. It is brought by virtue of the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51; Act of April 22, 1908, c. 149 sec. 1; 35 Stat. 65 and its amendments). The trial in the District Court resulted in a verdict and judgment for the defendant. The petitioner-plaintiff appealed alleging that reversible error was committed by the trial court during the trial.

(1)

Misconstruction of the Standards.

Section 2 of the Safety Appliance Act (45 U. S. C. A. Sec. 11; Act of April 14, 1910, c. 160; 36 Stat. 298) provides:

"It shall be unlawful for any common carrier subject to the provisions of section 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to wit: All cars must be equipped with secure sill steps and *efficient hand brakes;* . . ."

Pursuant to Section 3 of the Act, the Interstate Commerce Commission has promulgated standards and regulations the material portion of which are:

"It is ordered, That the number, dimensions, location, and manner of application of the appliances provided for by section two of the Act of April 14, 1910, and section four of the Act of March 2, 1893, shall be as follows:

"HANDBRAKES: . . . The brake shaft shall be not less than one and one-fourth (1¼) inches in diameter . . . Brake ratchet wheel shall be secured to brake shaft by a key or square fit, said square fit shall be not less than one and five-sixteenths (1 5/16) inches square . . ."

2 *Roberts, Federal Liability of Carriers* (2d Ed.) Appendix Q. 2010, 2011.

The Commission has also specifically described the conditions of a brake which shall be considered defects. Among these are:

"#132 *Brake shaft loose*".
"#147 *Ratchet wheel loose*".
Classification of Safety Appliance Defects; Bureau of Safety, Interstate Commerce Commission (1938).

These rules are integral parts of the Act and have

the force of law and judicial notice of them is required of all courts:

> *Lilly v. Grand Trunk W. Ry. Co.*, 317 U. S. 481, 489, 63 S. Ct. 347, 352.

And a violation of the Act or of the regulations is negligence per se

> *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 484, 36 S. Ct. 626.

Plaintiff's evidence was that the brake shaft and ratchet wheel were worn and loose. In defense of the cause, defendant offered the evidence of car inspectors who examined the brake. They testified that they found that the ratchet and shaft were loose and worn (242a, 256a, 267a, 258a, 285a) and that there was play between the parts up to 1/8th and 3/16ths of an inch (252a, 256a, 267a, 259a, 284a). Over plaintiff's objections, these witnesses were then permitted to testify that the brake was effective and efficient (203a, 249a, 250a, 263a, 271a, 272a) and in good operating condition (211a, 242a) and that ordinarily there was play between these parts on many cars of the same kind (74a, 79a). The trial judge instructed the jury that they might find from this evidence that the appliance was safe (340a) and did not instruct them as to the requirements that the parts be "*secured*". In so doing the trial judge misconstrued the standards and permitted the defendant's witnesses to substitute their opinions for the judgment of the Commission and allowed the jury to accept the former, thus completely ignoring the express decision of this Court:

> "The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do

but to ascertain the meaning of a few simple words in which the duty is described."

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 294, 28 S. Ct. 616.

To require that the parts be "secured" can mean only one thing:—that they be "made fast"; "seized and confined". The similar use of the word throughout the regulations permits no doubt of this to exist. The very antonym of "secured" is "loose" which is used in the Classification to indicate defects. Yet the witnesses were permitted to testify that loose parts were efficient and the jury were allowed to accept such testimony. The majority of the Circuit Courts of Appeals has accepted this misconstruction but it is clearly demonstrated in the dissenting opinion of Judge Biggs (383). Not only is this an erroneous construction of the regulations but defendant has thereby persuaded the Court to say that it need not comply with the law if only it will furnish an appliance which a jury may say, if permitted to do so, is just as good as the one required. This Court has firmly stated in:

St. Joseph G. & I. Ry. Co., v. Moore, 243 U. S. 311, 37 S. Ct. 278:

> "It is not admissible to allow such an important statutory requirement to be satisfied by equivalents or by anything less than literal compliance with what it prescribes." (315).

The majority opinion upon rehearing infers (382) that this question was first raised in the petition for rehearing. In fact objection was promptly made to the introduction of the inadmissible testimony when offered, and this issue was immediately raised (74a, 79a, 224a); the issue was presented to the District Court in the motion for new trial (348a, 349a) and to the Circuit Court of Appeals in the original brief (p. 35).

(2)

Admissibility of Opinion Evidence.

It is the well-settled rule of decision of the Federal Courts that the test of compliance with the standards of the Safety Appliance Act is primarily effectivess in operation:

2 Roberts' Federal Liability of Carriers (2d Ed.) 1232;
Didinger v. Pa. R. Co., 39 F. (2d) 798, 799;
Spotts v. Baltimore & Ohio R. Co., 102 F. 2d 160, 162-163 (cert. den. 307 U. S. 641, 59 S. Ct. 1039);
Chicago St. P. M. & O. Ry. Co. v. Muldowney, 130 F. 2d 971, 975 (cert. den. 317 U. S. 700, 63 S. Ct. 526).

The evidence of the car inspectors offered by the defendant was based on a stationary inspection; none of them rode the car in motion (204a, 250a, 282a) and two of them had never ridden such a car down the hump (204a, 218a, 292a). Their testimony that the brake was effective, efficient and in good operating condition (203a, 211a, 242a, 249a, 250a, 263a, 271a, 272a) was therefore totally inadmissible.

The additional fact that no evidence was presented to prove that the brake was in the same condition when examined by them as at the time of the accident is also of importance (137a, 186a, 215a, 223a, 237a). It is fundamental that the condition of an appliance some time *after* an accident, is not evidence of its condition *at the time* of the accident.

Neither the brakeman who released the brake after the accident (140a) nor any of the witnesses admittedly present at the time or immediately thereafter (32a, 152a, 153a, 156a) were produced by the defendant.

(3)

Effect of Prior Inconsistent Statements.

In the case of *Stewart v. B. & O. R. R. Co.*, 137 F 2d 527, the Circuit Court of Appeals for the Second Circuit specifically held that upon a plea of surprise a witness may be interrogated as to a prior statement and that, if he admits the truth of such statement, the facts therein contained become substantive evidence in the case and are to be treated as such.

The Circuit Court of Appeals in the instant cause refused to follow this decision when it held that there was no error in the ruling of the District Court *directly to the contrary* (53a, 58a, 59a, 61a, 62a, 67a). The facts were precisely the same as in the *Stewart* case: a hostile witness who had given a prior conflicting statement; a plea of surprise; a question as to the truth of the prior statement (58a, 59a, 61a, 62a) and a ruling that the statement could not become substantive evidence in the cause. Judge Augustus Hand speaking for the Court in that case said (page 529):

> "Inasmuch as Edman proved a hostile witness, the plaintiff was entitled to cross-examine him for purposes of impeachment and, if he had testified the affidavit was true, to use his statements in the affidavit as affirmative proof in her case".

(4)

Right to Rely Upon General Negligence.

The issues submitted to the jury in this cause were limited to the defendant's violations of the Safety Appliance Act. The trial judge failed and refused to submit to the jury the right of the plaintiff to recover under the Federal Employers' Liability Act for the general negligence of the defendant. The uncontradicted testimony

proved the negligence of Rihm in failing to keep a lookout (22a, 309a, 312a) as he was required to do (22a, 312a) and that the two drafts were running too closely together down the hump (21a, 22a). The jury should have been permitted to decide whether the subsequent collision of the cars (310a, 315a) was due to this lack of care on defendant's part and whether the accident was caused thereby.

In finding no error in the action of the District Court in failing so to do, the Circuit Court of Appeals has failed to follow the well-established rule that reliance upon Safety Appliance Act violations does not preclude concurrent reliance upon general negligence of the railroad:

> *Moore v. St. Joseph G. & I. Ry. Co.*, 186 S. W. 1035, 268 Mo. 31 (aff. 243 U. S. 311, 37 S. Ct. 278).

The duty to provide a safe place to work has been recently re-emphasized by this Court:

> *Bailey v. Central Vt. Ry. Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 1064,

and the liability arising from violation of a rule, custom or practice has been restated by the Third Circuit in:

> *Jacobs v. Reading*, 130 F. 2d 612.

The position taken by the District Court that the claim of general liability was waived by the plaintiff (351a) seems to have been abandoned by the defendant in the Circuit Court. No such waiver will be found in the record. The pre-trial conference resulted in no journal entry limiting the issues as required by *Federal Rule of Civil Procedure* #16. Instead the defendant has urged that the claim was never made at the trial.

The complaint was drawn under the Federal Employ-

ers' Liability Act (2a, 4a) and defendant set up a separate defense of contributory negligence (6a) which could have no application to the charge of Safety Appliance Act violations. This defense was never stricken or withdrawn (11a). The case under the general Act was stated to the jury (12a-15a) and the evidence sustained it. At the close of plaintiff's case this evidence was directed to the trial court's attention (130a, 131a) and was again discussed at the close of all the evidence (322a). A request for charge based *solely* on the Federal Employers' Liability Act was submitted (343a) and exception to the charge was taken for failure to include instructions under that Act (341a, 342a).

(5)

Error in the Charge.

When the defendant requested the trial judge to charge that the jury should find for the defendant if it could not determine the cause of the fall (345a), the court conceded that a qualification of the point was necessary to the effect that the jury might consider the circumstances and make reasonable inferences therefrom (327a, 328a). In the charge the qualification was entirely omitted and the request charged as originally presented (338a). In addition, at the conclusion of the charge, a specific request to charge on the presumption arising from death was refused (340a, 341a). The refusal was error in direct violation of the rulings in *Tennant v. Peoria & P. V. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, and *Worthington v. Elmer*, 207 Fed. 306, 308-209. Cases in which recovery was sustained solely upon circumstantial evidence are legion: Cf. *Bailey v. Central Vt. Ry. Inc.*, 319 U. S. 350, 63 S. Ct. 1062; *Tennant v. Peoria & P. V. Ry. Co.*, supra.

Petitioner therefore prays that this Court issue a writ of certiorari herein, and that the judgment of the

United States Circuit Court of Appeals for the Third Circuit, rendered herein on July 10, 1944 and which became final on December 29, 1944 be reversed and a new trial granted.

Respectfully submitted,

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